RECORD
AND 1
BRIEFS

No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent Cougar Den seeks to obscure the facts of this case, the conflict at its core, and its importance. Its efforts fail.

Cougar Den hires a non-Indian contractor to bring millions of gallons of fuel into Washington, where Cougar Den sells the fuel to Yakama-owned gas stations, which sell the never-taxed fuel to the public. The Washington Supreme Court held that the State cannot apply its wholesale fuel tax to Cougar Den because the Yakama Nation's treaty right "to travel upon all public highways" means that the State cannot tax "any trade, traveling, and importation that requires the use of public roads." Pet. App. 16a. By contrast, the Ninth Circuit has *never* held that the treaty exempts any goods from tax, instead holding that it creates no "right to trade" free from state taxation. And this Court has repeatedly held that non-discriminatory state taxes applied off-reservation, like the tax here, are valid absent express federal law to the contrary. The immediate cost of the Washington court ruling is tens of millions in lost tax revenue, and the long-term costs to Washington and other States will be vastly larger. The conflict is real, the case is important, and the Court should grant review.

ARGUMENT

A. The Washington Supreme Court's Decision Starkly Conflicts with the Ninth Circuit's Rulings

The Ninth Circuit has never held that "the right . . . to travel upon all public highways" in the Yakama Treaty preempts a tax on goods, like the one

at issue here. Indeed, it has explicitly rejected the idea that the treaty creates a "right to trade" free from state taxes. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014), *cert. denied sub nom. Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542 (2015). Here, however, the Washington court read the treaty to preempt the State's tax on wholesale fuel, declaring that "any trade, traveling, and importation that requires the use of public roads" is exempt from taxation. Pet. App. 16a. These rulings conflict.

In arguing to the contrary, Cougar Den asserts that the decision below is entirely consistent with the Ninth Circuit's decision in *King Mountain*, and compelled by the Ninth Circuit's decision in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). These arguments fail.

King Mountain is the Ninth Circuit's most recent case interpreting the Yakama Treaty and the only case, like this one, that dealt with a tax or fee on goods. Cougar Den argues that the decision below is consistent with *King Mountain* because "the burden on the tribal member in *King Mountain* . . . had nothing to do with travel," while this case involves travel. BIO 24. That argument is factually and legally untenable.

To begin with, this argument is inconsistent with the facts of *King Mountain* and the Yakama Nation's position in that case. *King Mountain* involved extensive travel by highway: King Mountain Tobacco used its trucks to transport tobacco from North Carolina to Washington and then delivered its cigarettes to stores in Washington and 16 other

states. *King Mountain Tobacco Co., Inc. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342, at *2, *7 (E.D. Wash. 2013), *aff'd*, 768 F.3d 989 (9th Cir. 2014). And the Yakama Nation argued extensively in *King Mountain* that the cigarette escrow fee at issue burdened the right to travel on highways in the same way that Cougar Den claims paying taxes on wholesale fuel burdens the right to travel. For example, the Tribe specifically argued that the escrow fee violated the "right to bring their goods to market without restrictions on their travel."[1]

Moreover, Cougar Den's characterization of the issue in *King Mountain* reinforces the existence of the conflict here, because its description applies equally to this case. Cougar Den argues that "the escrow statute in *King Mountain* did not restrict or place conditions on travel" because it "was a mandatory flat-fee payment for every unit of tobacco sold." BIO 22; BIO 24 (escrow fee "had nothing to do with travel" because it was a flat-fee). That is not a distinction because the same is true here. Washington's

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[1] Reply Br. (Dkt. Entry: 25 (2013 WL 6158628)), *King Mountain Tobacco, Inc. v. McKenna*, No. 13-35360, at 1; *see also* Opening Br. (Dkt. Entry: 10 (2013 WL 4077100)), *King Mountain Tobacco, Inc. v. McKenna*, No. 13-35360, at 23 (cigarette fee violated a "right to produce and sell products in the State of Washington and elsewhere, without the kinds of restrictions imposed by the Washington statutes"); *id.* at 24 (escrow fee violated the Tribe's "right to travel and trade outside the boundaries of the reservation free from state-imposed economic restrictions"); *id.* at 29-30 (cigarette escrow fees are "economic restrictions or pre-conditions on" trade over highways); *id.* at 32; Pet. for Reh'g En Banc (Dkt. Entry 36-1), *King Mountain Tobacco, Inc. v. McKenna*, No. 13-35360, at 2 (escrow charges violated a "right to transport goods to market without restriction"); *id.* at 15 (treaty "guarantees a broad right to trade that overlaps with the right to travel 'to transport goods to market without restriction'").

wholesale fuel tax is a "mandatory flat-fee payment for every unit of" fuel sold. Pet. App. 51a-52a (describing structure of Washington fuel tax laws). Cougar Den attempts to obscure this undisputed point by labeling the fuel tax here an "import tax." BIO 23. But Washington's wholesale fuel tax applies to fuel whether it is purchased in Washington or elsewhere. If the distributor obtains fuel at a bulk facility in Washington, the supplier has paid the tax; if a distributor obtains fuel outside of Washington, it owes the tax when it brings it into Washington. Pet. 5; Pet. App. 4a, 19a-22a; BIO App. 18-22. Cougar Den's decision to buy fuel outside of Washington and then bring it into Washington does not convert this into a tax on travel. The fuel would be taxed even if Cougar Den purchased it in Washington, and even if Cougar Den never transported the fuel on "the public highways," as the Washington Supreme Court acknowledged. Pet. App. 13a-14a (tax applies "regardless of whether Cougar Den uses the highway"). Thus, Cougar Den's claim that *King Mountain* involved "a mandatory flat-fee payment for every unit" sold not only fails to distinguish the Washington Supreme Court decision, it emphasizes the conflict. Just as the Ninth Circuit upheld the escrow fee there, it would have upheld the tax here.

Cougar Den also argues that *Smiskin* compels the result here because it establishes a rule that "the Treaty preempts state laws that restrict or place conditions on . . . 'bringing goods to market' (*Smiskin*)." BIO 22. But *Smiskin* establishes no such rule.

Smiskin held that the treaty exempted the Yakama from a state law requiring people to notify the State before transporting untaxed cigarettes. *Smiskin*, 487 F.3d at 1264, 1266. In doing so, the opinion incorporated broad language, first used by the district court in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), that the treaty assured the Yakama of the "right to transport goods to market without restriction." *Smiskin*, 487 F.3d at 1266. But that language has to be viewed in context. The district court used it in *Yakama Indian Nation* in evaluating state fees imposed for use of heavy trucks, i.e., "fees imposed *for use of* the public highways." *Yakama Indian Nation*, 955 F. Supp. at 1253 (emphasis added). In affirming that ruling, the Ninth Circuit explained that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*." *Cree*, 157 F.3d at 769 (emphasis added). *Smiskin* similarly involved a restriction directly on the use of highways—a requirement to give the State advance notice. *Smiskin*, 487 F.3d at 1266; *King Mountain*, 768 F.3d at 998 (*Smiskin* concerns a notice "requirement" that "imposes a condition on travel.").

Here, it is undisputed that the wholesale fuel tax is not a tax *for the use* of the highway. Pet. App. 13a-14a (tax applies "regardless of whether Cougar Den uses the highway"). And the Ninth Circuit has never held or even implied that the phrase "right to transport goods to market without restriction" creates a right to avoid taxes on goods transported by highway, as the Washington court held here. Indeed,

the Ninth Circuit used this same language in *King Mountain* even as it upheld imposition of a State fee on goods transported by highway, emphasizing that the treaty contains no "right to trade" that preempts state taxes on goods. *King Mountain*, 768 F.3d at 998.

Thus, the actual holdings of the cases Cougar Den cites refute the broad rule it advocates. Moreover, Cougar Den's reading of the cases would have absurd consequences that the Ninth Circuit has never endorsed. For example, truck weight limits, speed limits, commercial driver's license laws, and a variety of other state laws "restrict or place conditions on . . . 'bringing goods to market.'" BIO 22. The Ninth Circuit has never held any such law preempted by the Yakama treaty.

The bottom line is that Cougar Den's attempts to harmonize the opinion below with Ninth Circuit precedent fail. Cougar Den claims the Ninth Circuit preempts "state laws that restrict or place conditions on . . . 'bringing goods to market'" but not "encumbrances on the sale of goods." BIO 22. That simply is not the Ninth Circuit rule. In the Ninth Circuit, only state laws that impose fees and other pre-conditions on Yakama members' travel on highways are preempted. *King Mountain*, 768 F.3d at 997-98; *Smiskin*, 487 F.3d at 1266; *Cree*, 157 F.3d at 769. State economic "encumbrances" on Yakama-owned goods that happen to be transported over highways while brought to market are not preempted. *King Mountain*, 768 F.3d at 997-98. The Washington Supreme Court's rule conflicts with the Ninth Circuit's because it exempts from taxation "*any trade*, traveling, and importation *that requires the use of*

public roads." Pet. App. 16a (emphases added). This Court should resolve this conflict.

B. The Washington Supreme Court Decision Conflicts with this Court's Rulings

The Washington Supreme Court's decision conflicts with two fundamental principles of this Court's Indian law jurisprudence: (1) that Indians are subject to nondiscriminatory state taxes and regulations outside a reservation absent express federal law to the contrary, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-50 (1973); and (2) that courts will not add to treaties rights that the parties never agreed upon, *e.g.*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995). Cougar Den admits that these rules exist and apply, BIO 25, 28, but it offers no plausible explanation of how these principles can be reconciled with the opinion below. They cannot be.

Cougar Den claims that the first principle—the requirement of express federal law to preempt State taxes off-reservation—"merits little discussion" because the Washington Supreme Court found that the Yakama Treaty "was such an 'express federal law.'" BIO 25. This misses the point entirely.

The State has never disputed that the Yakama Treaty exists, or what it says. The question is whether its words expressly preempt application of this tax. The Washington court held that the Yakama's treaty "right . . . to travel upon all public highways" preempted application of this tax even though this tax

applies "regardless of whether Cougar Den uses the highway," and even though no Yakama traveled on the public highways in transporting this fuel (it was done by non-Indian contractors). Pet. App. 2a, 13a-14a, 40a. If this language amounts to an express law preempting application of this tax, then the rule has no meaning. Nearly any interpretation of any federal law or treaty would satisfy *Mescalero*, *Wagnon*, and a string of cases rejecting implied claims of preemption. Such an approach would undermine State authority and the very purpose of this Court's approach: to provide a "bright-line standard" "to ensure efficient tax administration" by States. *Wagnon*, 546 U.S. at 113; *see also Mescalero*, 411 U.S. at 156.

The conflict with this Court's decisions is especially stark because this Court has repeatedly emphasized that tribes and their members are subject to generally applicable off-reservation taxes "[a]bsent a '*definitely expressed*' exemption." *Mescalero*, 411 U.S. at 156 (emphasis added) (quoting *Choteau v. Burnet*, 283 U.S. 691, 696 (1931)); *id.* at 156 ("[T]ax exemptions are not granted by implication." (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943))); *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (tax exemptions must be "clearly expressed" (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[E]xemptions from taxation . . . must be unambiguously proved" (alterations in *Wells Fargo Bank*)))). Neither the Washington court nor Cougar Den offers any plausible explanation of how the Yakama's "right . . . to travel upon all public highways" unambiguously and expressly allows the Yakama to avoid this tax.

Turning to the second principle, Cougar Den argues that the Washington court simply applied the canon of construction that ambiguous treaty language is interpreted in a tribe's favor. BIO 25-28. But "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), *quoted in King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 995 (9th Cir. 2014) (alterations in *King Mountain*); *see also Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). Applying this principle, the Ninth Circuit observed that the Yakama Treaty reserved "the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *King Mountain*, 768 F.3d at 997; *see also Ramsey v. United States*, 302 F.3d 1074, 1080 (9th Cir. 2002) (holding "that the relevant Treaty provision contains no 'express exemptive language'" and rejecting claim that Yakama business was exempt from federal fuel taxes), *cert denied*, 540 U.S. 812 (2003). There is simply no plausible interpretation of a treaty right "to travel upon all public highways" that would preempt application of a tax on goods that applies "regardless of whether Cougar Den uses the highway." Pet. App. 13a-14a.

In short, the Washington court's decision conflicts with this Court's decisions on foundational points of Indian law. The Court should address these conflicts.

C. The Question Presented is Important and is Cleanly Raised Here

Cougar Den seeks to downplay the importance and cert-worthiness of this case by obscuring the facts and misrepresenting the holding below. The Court should see through this effort.

Cougar Den first attempts to minimize its massive tax avoidance and confuse the issues by asserting that "its sales are to enrolled members of the Yakama Nation." BIO 5. This is misleading. The retail gas stations that Cougar Den supplies are owned by Yakama members. But it is undisputed that those stations sell the untaxed fuel to the general public in vast quantities. Pet. App. 50a; *cf. Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("federal Indian law" does not "authorize Indian tribes thus to market an exemption from state taxation").

Cougar Den also claims that the State's "revenue concerns are overstated and an inappropriate basis for certiorari." BIO 35. But Cougar Den stipulated that it wholesaled millions of gallons of fuel in just a few months in 2013, Pet. App. 64a, and it is undisputed that Cougar Den has avoided tens of millions of dollars in fuel taxes that are currently stayed pending resolution of the legal issue in this case. Cougar Den never explains why the loss of tens of millions of dollars in tax revenue based on a misinterpretation of a federal treaty is "an inappropriate basis for certiorari," BIO 35, and this Court's cases compel the opposite conclusion, repeatedly emphasizing the centrality of

the taxing power to State sovereignty. *See, e.g.*, *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870).

Although Cougar Den never meaningfully disputes that the Petition presents this Court with a clean vehicle to address the question presented, it briefly suggests that the case actually turns on a state law dispute about "Washington's fuel tax code." BIO 2, 33-34. But there is no relevant state law issue in dispute. Cougar Den claims that the case turns on whether the fuel tax is "a tax on 'bringing goods to market' or a tax directed at the goods themselves," BIO at 33, but those are federal concepts from the cases interpreting the treaty, not terms found anywhere in state law.

Finally, Cougar Den suggests that the issues in this case are unimportant because Washington "can amend its statutes" to prevent Cougar Den's tax avoidance. BIO 35. But Cougar Den offers no plausible way that this might be achieved and ignores that Washington's fuel tax already mirrors the tax this Court upheld in *Wagnon*, 546 U.S. 95. States across the country have adopted the same approach, and are understandably deeply concerned about the scope of the tax avoidance the Washington Supreme Court has enabled. *See* States' Amicus Br. 4 ("The Washington court's misreading of the right-to-travel provision has legal and practical significance far beyond Washington State boundaries or motor fuel taxes."). As Cougar Den distributes fuel to more and more reservations across the country, States that have already modified their laws in accordance with *Wagnon* should not now have to modify their laws again based on the Washington court's misreading of a federal treaty.

CONCLUSION

Cougar Den's arguments against certiorari fall short. The opinion below conflicts with decisions of the Ninth Circuit and this Court about vitally important issues of treaty interpretation and State taxing power. This Court should grant review.

RESPECTFULLY SUBMITTED.

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